

U. S. DEPARTMENT OF LABOR  
Employees' Compensation Appeals Board

---

In the Matter of LAVERNA S. PUGH and DEPARTMENT OF THE AIR FORCE,  
SHEPPARD AIR FORCE BASE, TX

*Docket No. 02-1154; Submitted on the Record;  
Issued January 31, 2003*

---

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

This case is on appeal before the Board for the third time. By decision dated July 3, 2000, the Board affirmed the Office's February 11, 1999 decision denying reconsideration and modified the Office's September 28, 1998 decision to reflect appellant's entitlement to a schedule award for a seven percent permanent impairment of her left lower extremity.<sup>1</sup> Additionally, the Board affirmed that aspect of the Office's September 28, 1998 decision regarding the determination that the position of office automation clerk fairly and reasonably represented appellant's wage-earning capacity effective August 22, 1997 the date she voluntarily resigned from federal service. The Board also found that the Office correctly determined that appellant had no loss of wage-earning capacity.

On August 1, 2000 the Office issued a decision granting appellant a schedule award for an additional five percent permanent impairment of her left lower extremity. Appellant filed a timely appeal with the Board. In a decision dated May 10, 2001, the Board affirmed the Office's August 1, 2000 schedule award.<sup>2</sup>

On January 23, 2002 appellant filed a request for reconsideration with the Office seeking further review of the Board's July 3, 2000 decision. In a decision dated March 20, 2002, the Office found that appellant's request was untimely and failed to present clear evidence of error.

---

<sup>1</sup> Docket No. 99-1407.

<sup>2</sup> Docket No. 00-2653. The Board's May 10, 2001 and July 3, 2000 decisions are incorporated herein by reference.

The Board finds that the Office erred in concluding that appellant's request was untimely.

Section 8128(a) of the Federal Employees' Compensation Act<sup>3</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>4</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against payment of compensation.<sup>5</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a).<sup>6</sup> One such limitation is that the application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>7</sup>

In this particular case, the one-year time limitation begins to toll the day following the issuance of the Board's July 3, 2000 decision, as this was the last merit decision in the case regarding the issue of appellant's entitlement to wage-loss compensation.<sup>8</sup> The Office found that as appellant's request for reconsideration was dated January 23, 2002, she was not entitled to review of her claim as a matter of right. The record, however, indicates that appellant wrote to the Office claims examiner on at least four occasions between July 26, 2000 and May 17, 2001 seeking further review of her entitlement to continuing wage-loss compensation. In her July 26, 2000 correspondence, appellant noted that she had a letter from her treating physician, Dr. Danny R. Bartel, stating that she was not physically able to perform gainful employment. She purportedly submitted Dr. Bartel's report under cover letter dated March 23, 2000. In a letter dated August 11, 2000, appellant described her understanding of what was necessary to obtain modification of the loss of wage-earning capacity determination and again referred to Dr. Bartel's March 9, 2000 report as a basis for entitlement to compensation. Appellant submitted similar letters on April 11 and May 17, 2001.

In its March 20, 2002 decision, the Office stated, among other things, that it had previously considered Dr. Bartel's March 9, 2000 report. As Dr. Bartel's report post-dates both the Office's September 28, 1998 merit decision as well as its February 11, 1999 decision denying reconsideration, the Office could not have previously considered this evidence relevant to the issue of appellant's entitlement to wage-loss compensation. Additionally, there is no indication in the record that the Office responded to any of the four requests appellant submitted between July 26, 2000 and May 17, 2001. Accordingly, the Board finds that appellant has requested

---

<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>5</sup> Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>6</sup> 20 C.F.R. § 10.607 (1999).

<sup>7</sup> 20 C.F.R. § 10.607(a) (1999).

<sup>8</sup> See *Veletta C. Coleman*, 48 ECAB 367, 369 (1997). While the Board's July 3, 2000 decision tolls the time period for purposes of determining whether appellant filed a timely request for reconsideration, the Office does not have the authority to review the Board's decision; see *Theresa Johnason*, 50 ECAB 317, 318 (1999).

modification of the wage-earning capacity determination which was not responded to. The Office improperly determined that appellant had requested reconsideration untimely.

The March 20, 2002 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, DC  
January 31, 2003

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member